A

M JEFREE MD YUSOFF

v.

PP

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI JC
[CRIMINAL APPEAL NO: L44-07-2008]
24 SEPTEMBER 2008

C ***CRIMINAL LAW:*** *Penal Code - Section 408 - Criminal breach of trust - Entrustment - Element of entrustment found proved upon inadmissible evidence - Effect - Whether conviction thereof unsustainable*

CRIMINAL PROCEDURE: *Burden of proof - Defence case - Ruling that 'defence failed of balance of probabilities to sufficiently address evidence pertaining to charge' - Whether a misdirection - Whether shifting burden to the defence - Whether putting on accused burden heavier than raising a reasonable doubt*

D

E The appellant, the branch manager of Pos Malaysia Bhd's Kompleks Ujana Kewangan branch, Labuan, had been convicted of an offence under s. 408 of the Penal Code when cash money of RM22,000 which had allegedly been entrusted to his custody on 15 March 2006 was found to be missing. In so convicting the appellant, the learned magistrate *inter alia* alluded to the defence

F as having failed to "cast a reasonable doubt at the stage of the prosecution's case, nor did it on a balance of probabilities sufficiently address the evidence pertaining to the charge at the defence stage". In this appeal, a question arose as to whether the learned magistrate, in condescending to the above test, had

G applied the wrong burden of proof on the defence case or otherwise had placed upon the appellant a burden not imposed on him by law. The facts further showed that the learned magistrate, in making a finding that entrustment had sufficiently been proved, had relied solely on the record of monies received by the branch

H from the public on 15 March 2006 ('P5'). P5's contents, however, had never been proved, and that being so, questions further arose as to whether a *prima facie* case had not been made out against the appellant, and if so whether a retrial could or ought to be ordered by the learned judge herein.

I

Held (allowing appeal and acquitting and discharging appellant):

(1) A pronouncement such as made by the learned magistrate herein is confusing and should be avoided. In any case, by applying the "balance of probabilities" test in dealing with the defence, the learned magistrate had misdirected himself on the burden of proof. No doubt the offence which the appellant was charged with requires the appellant to explain what happened to the money that was entrusted to him. But to require the appellant to "address" the prosecution evidence on a balance of probabilities is to go beyond asking for explanation. It is shifting the burden. In fact, the learned magistrate had imposed on the appellant a duty heavier than to merely raise a reasonable doubt. On this ground alone the conviction cannot stand. (paras 3 & 4)

(2) On the question of retrial, the rule is that where the prosecution has adduced all the evidence against the accused which if unrebutted would warrant his conviction, then the failure of justice occasioned by the trial court in placing the wrong burden of proof on the accused cannot be laid to the door of the prosecution. The question thus turns on whether the prosecution has adduced sufficient evidence to prove a *prima facie* case against the appellant. (para 5)

(3) In this case, while there was a shortfall of RM22,000, there is no evidence to show when, from whom and for what purpose the RM22,000 was handed to the appellant, if at all it was handed to him. The prosecution's evidence of entrustment is solely and entirely based on P5, but since P5's contents had not been proved the document remained hearsay and should therefore be inadmissible in evidence. Being hearsay and inadmissible P5 should have been disregarded by the learned magistrate. Had P5 been so disregarded, there would have been no proof of entrustment and without proof of entrustment there would have been no *prima facie* case against the appellant. (para 5)

(4) Against this background, the conviction and sentence must be set aside and the appellant must be acquitted and discharged. To order a retrial would give the prosecution a second bite at the cherry and this the court is not prepared to do. (para 6)

Case(s) referred to:
Anuar Afandi v. PP [1999] 4 CLJ 545 HC ***(refd)***
Mahadi v. PP [1969] 1 LNS 103 ***(refd)***
Mat v. PP [1963] 1 LNS 82 ***(refd)***
Sathiadas v. PP [1970] 1 LNS 142 ***(refd)***

For the appellant - Rakhbir Singh; M/s Rakhbir Singh & Co
For the respondent - Mohamed Zairi Zainal Abidin DPP, AG's Chambers

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Abdul Rahman Sebli JC:

[1] The charge against the appellant was as follows:

> Bahawa kamu, pada 16 haribulan Mac 2006 jam lebih kurang 1000 hrs bertempat di Pos Malaysia Bhd Kompleks Ujana Kewangan, Wilayah Persekutuan Labuan, di dalam Wilayah Persekutuan Labuan, sebagai seorang yang mempunyai dominasi keatasnya dan juga kapasiti sebagai Pengurus Cawangan Pos Malaysia Bhd Ujana Kewangan telah melakukan Pecah Amanah Jenayah keatas harta tersebut yang bernilai RM22,000 (wang tunai). Oleh itu, kamu telah melakukan kesalahan dibawah seksyen 408 Kanun Keseksaan.

[2] He claimed trial to the charge at the end of which he was found guilty by the learned magistrate and sentenced to 18 months' imprisonment and two strokes of the rotan. He was also fined RM5,000 in default six months' imprisonment. Among the grounds of appeal is that the learned magistrate failed to apply the correct test in dealing with the defence. There is merit in the complaint. In his grounds of decision it is clear that the learned magistrate had placed a burden on the appellant which the law did not. This is what he said:

> At the conclusion of the trial, it was the finding of this court that the accused person's defence did not cast a reasonable doubt at the stage of the prosecution's case, **nor did it on a balance of probabilities sufficiently address the evidence pertaining to the charge at the defence stage.** (emphasis added)

[3] What the learned magistrate is saying is that not only had the defence failed to cast a reasonable doubt in the prosecution's case but had also failed to rebut the prosecution's evidence on a balance of probabilities. A pronouncement such as this is confusing and should be avoided in dealing with a case where no legal burden is placed on an accused person. The phrase "on a balance of probabilities" is normally associated with the civil burden of proof. It is trite that in criminal law unless by statute the onus is reversed the accused has no duty to prove or disprove anything. The burden throughout is on the prosecution to prove its case beyond any reasonable doubt. What is required of the accused to entitle him to acquittal is merely to raise a reasonable doubt in the prosecution's case. By applying the "balance of probabilities" test in dealing with the defence the learned magistrate had clearly misdirected himself on the burden of proof. The offence which the appellant was charged with no doubt requires the appellant to explain what happened to the money that was entrusted to him: *Sathiadas v. PP* [1970] 1 LNS 142. But to require the appellant to "address" the prosecution evidence on a balance of probabilities is to go beyond asking for explanation. It is shifting the burden of proof.

[4] The learned magistrate should have followed the procedure laid down in *Mat v. PP* [1963] 1 LNS 82. In that case Suffian J (as he then was) explained that if the magistrate did not believe the story of the defence, he was nevertheless bound to consider whether the defence, though disbelieved by him, had not raised any reasonable doubt in his mind. In other words if, despite having rejected the defence the magistrate is nevertheless less than sure of the accused's guilt then he must acquit for then there would be a lingering doubt in his mind as to the guilt of the accused. An accused person can only be convicted if the court is sure of his guilt which is another way of saying that the case is "proved beyond reasonable doubt". By asking whether the appellant had on a balance of probabilities sufficiently answered the prosecution's case the learned magistrate had imposed on the appellant a duty heavier than to merely raise a reasonable doubt. This is not a correct approach. On this ground alone the conviction cannot stand.

[5] The question is whether I should order a retrial. Where the prosecution has adduced all the evidence it has and the evidence has established a *prima facie* case against the accused which if unrebutted would warrant his conviction, then the failure of justice occasioned by the trial court in placing the wrong burden of proof on the accused cannot be laid to the door of the prosecution: *Mahadi v. PP* [1969] 1 LNS 103. But has the prosecution adduced sufficient evidence to prove a *prima facie* case against the appellant? One of the ingredients of the charge which the prosecution needed to prove is the element of entrustment. In this regard the prosecution's case is that the RM22,000 cash, the subject matter of the offence was in the custody of the appellant and therefore entrusted to him before it was discovered missing on 16 March 2006. It was disclosed in evidence that at closing time on 15 March 2006 the total amount of cash deposited with Pos Malaysia at the Ujana Kewangan branch of which the appellant was manager was RM27,937.10 but that when Jainap binti Osman (PW1) took over duties from the appellant on 16 March 2006 only a sum of RM5,937.10 cash was handed to her by the appellant. There was therefore a shortfall of RM22,000. There is no evidence however to show when, from whom and for what purpose the RM22,000 was handed to the appellant, if at all it was handed to him. The prosecution's evidence of entrustment is solely and entirely based on the document called "Kira-Kira Wang Tunai Ketua Pejabat Pos" (P5) which is actually a record of the monies received by the Ujana Kewangan branch of Pos Malaysia from the public on 15 March 2006. The prosecution did not call any witness to prove the contents of P5. In the absence of oral evidence to prove the contents of P5 clearly the document is hearsay and does not constitute proof of entrustment. In *PP v. Anuar Afandi* [1999] 4 CLJ 545 Nik Hashim J (as he then was) in holding that the prosecution failed to prove entrustment quoted with approval the following passage from *Ratanlal & Dhirajlal's Law of Crimes* 24th edn:

> Mere entries in books of account without any oral evidence as to the nature of business and the mode of keeping account is not sufficient to prove entrustment.

[6] Being hearsay and therefore inadmissible in evidence P5 should have been disregarded by the learned magistrate. It was his duty to disregard all inadmissible evidence regardless of whether there was objection or otherwise to its production. Had P5 been disregarded there would have been no proof of entrustment. Without proof of entrustment there would have been no *prima facie* case against the appellant and his defence should not have been called. Against this background to order a retrial would in my view be to give the prosecution a second bite at the cherry which I was not prepared to do.

[7] In the circumstances the conviction and sentence were set aside and in substitution thereof the appellant was ordered to be acquitted and discharged.